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Reforming the Federal Criminal Code: A Top Ten List

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It is not as if the federal government has not tried to reform its criminal law. In 1966 Congress created a commission to draft a modern federal criminal code.[1] The panel reported its proposal in 1971,[2] but each of a series of attempts to pass a criminal code failed. A criminal code bill passed the Senate in 1978, but was not processed by the House.[3]

During this same post-Model Penal Code period, two-thirds of the States enacted a modern criminal code. The American Law Institute's Model Code, promulgated in 1962, influenced criminal code reform in countries beyond the United States.[4] It is particularly embarrassing, then, that, despite American world leadership in criminal code reform, the United States government will enter the 21st Century with a 19th Century criminal code.

High-profile voter-friendly crime issues are readily processed by Congress, but the characteristics of an effective criminal code—meaningful organization, internal consistency, rationality in formulation, and comprehensiveness in coverage—apparently are not of sufficient political payoff to interest federal legislators. These matters are of great practical importance to the day to day operation of the

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1. Act of Nov. 8, 1966, Pub. L. No. 89-801, 80 Stat. 1516 (1966).

2. NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT OF THE NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, S. DOC. NO. 1042, 92d Cong., 1st Sess. 129-514 (1971).

3. S.1437, 95th Cong., 2d Sess. (1978) (Senate vote: 72 for, 15 against). A criminal code bill was actively considered in two earlier Congresses. S.1, 93d. Cong., 1st Sess. (1973); S.1, 94th Cong., 1st Sess. (1975).

4. *See, e.g.*, LAW COMMISSION, A CRIMINAL CODE FOR ENGLAND AND WALES (Rep. No. 177, 1989); THE LAW REFORM COMMISSION OF CANADA, REPORT 30: RECODIFYING CRIMINAL LAW (1986); THE LAW REFORM COMMISSION OF CANADA, REPORT 31: RECODIFYING CRIMINAL LAW (1988).

system, however, and have a significant effect on who gets convicted of what and what gets appealed and reversed. Unfortunately, the value of such reforms cannot be reduced to a sound bite that will generate votes at the next election.

The current state of federal criminal law (it would be a stretch to say we have a "federal criminal code") makes it easy to suggest reforms. But given how difficult it seems to be to get federal criminal code reform passed, a realistic reformer would wish to concentrate on the most important changes. The challenge taken up in this essay is to provide a top ten list of the reforms needed to make a successful federal criminal code.

Many of the most fundamental and important reforms were contained in the Model Penal Code of 1962 and have been adopted by many, if not most, States. But in the 35 years since the Model Penal Code, time and experience have revealed shortcomings in that model. Criminal law is of paramount importance to today's society and the states continue to have legislative interest in reform. But, despite this, the American Law Institute has refused to revise its Model Code, although it routinely updates other projects.[5] On a subject that most Americans think is the most important social issue and on which the Institute once provided world leadership, the Institute now remains silent. Perhaps the silver lining here is that silence may provide an opportunity for the federal government to redeem itself for its past inaction. A revised federal criminal code, one that addresses the revealed weaknesses of the Model Penal Code, could provide a new model code for the States and other nations. While federal criminal jurisdiction is proper-

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5. On the other hand, the ALI often has taken some time between revisions: Restatement of the Law of Agency, 24 years (1933/1957), but 39 years since last update; Restatement of the Conflict of Laws, 35 years (1934/1969); Restatement of the Law of Contracts, 47 years (1932/1979); Restatement of the Law of Property, 45 years (1936/1981); Restatement of the Law of Restitution, 60 years (1937/tentative draft 1983); Restatement of the Law of Security, 55 years since original version (1941); Restatement of the Law of Torts, 43 years (1934/1977); Restatement of the Law of Trusts, 22 years (1935/1957), but 39 years since last update.

ly more limited than that of states, the characteristics of an effective criminal code are the same no matter the scope of its application.

I will suggest five innovations pioneered by the Model Penal Code drafters that are of central importance in a new federal criminal code. Then, I will suggest five further reforms, reforms that should be considered by the drafters of a Model Pedal Code 2d, if such an effort ever is undertaken.

I. CHARACTERISTICS OF A "MODERN CODE": LESSONS FROM THE MPC

The first five suggestions are basic lessons learned from the Model Penal Code. They essentially define the characteristics of what writers mean when they refer to a "modern criminal code." Because they are widely accepted in the United States and abroad, they need little justification here. This essay will reserve most of its space for the reforms that go beyond the Model Penal Code, examined in Part II.

1. Create a Comprehensive General Part

A central characteristic of modern criminal codes is the creation of a General Part, which includes a set of general principles that apply to each of the specific offenses contained in the Special Part of the code: general principles of liability, general principles of defense, general inchoate offenses, etc. This is hardly revolutionary, and was not so when the Model Penal Code adopted this form. Such a structure provides greater clarity and sophistication while simultaneously simplifying the code. Instead of having to repeat the rules governing complicity or omission liability or culpability requirements or available defenses in each offense (or instead of leaving them to courts to define) the rules can be stated once in detailed form in the General Part, to be referred to in the prosecution of any offense in the Special Part. (It is in part the failure to take full ad-

vantage of this power of general principles that makes the current United States Sentencing Guidelines longer, more complex, and less sophisticated than they need be.)[6]

The current federal criminal "code"—the term "code" suggests a document of greater coherence and planning than is seen here, so perhaps just reference to "Title 18" would be better—has essentially no General Part. Chapter 1, grandly titled "General Provisions," includes a less than helpful definition of complicity, an insanity defense, and several definitions.[7] Thus, 99% of the General Part remains uncodified, thereby delegating criminal law-making authority to the federal judiciary.

Such lack of a comprehensive description of General Part defenses and liability rules violates the legality principle. It causes unfairness because of the absence of adequate notice. It creates unnecessary discretion throughout the system, which necessarily increases the potential for abuse of discretion and for disparity in the treatment of similar cases. It shifts criminal law-making away from the representative legislative branch of government, which is where it belongs in a democracy. The failure to codify the rules governing liability and punishment also impedes debate over those rules; informed reform is possible only if the governing rules are clear to all, including non-lawyers, which they cannot be if they are not codified. The Model Penal Code, as well as the code proposed by the Federal Criminal Code Reform Commission, did a relatively good job of providing a comprehensive General Part that satisfies the demands of the legality principle.

2. Provide an Analytic Structure

Nearly every successful criminal code in Western Civilization either implicitly or explicitly provides an analytic

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6. Dissenting View of Commissioner Paul H. Robinson to the Promulgation of Sentencing Guidelines by the United States Sentencing Commission, 52 Fed. Reg. 18,121 (1987), *reprinted in* 41 CRIM. L. REP. 3174, 3184 (1987).

7. *See* 18 U.S.C. §§ 1-23 (1994).

structure, that is, it gives judges, lawyers, and jurors a decisional process for assessing criminal liability. In fact, most of the analytic structures share some fundamental distinctions, the distinctions most central to assessing criminal liability and blame. While the terminology varies from system to system,[8] a common three-part structure might be summarized with the following questions.

First, does the actor's conduct constitute a crime? This requires the code to define what the contours of the law's prohibitions are (and, where duties to act are created, the law's commands). This is the issue most familiar to lay persons and most prominent in older criminal codes. It is the sole subject of the entire Special Part of modern codes.[9] But criminal codes must ask at least two other questions in analyzing blame and liability.

Second, even if the actor's conduct does constitute a crime, are there special reasons why that conduct ought not be considered wrongful in this instance, under these facts? In the United States, this question generally is answered by use of justification defenses, Article 3 in the Model Penal Code. These defenses concede the existence of a prohibitory norm, but offer a countervailing justificatory norm that undercuts the propriety of liability on the special facts of the current situation.[10]

Finally, even if the actor's conduct is a crime and is wrongful (unjustified), should the actor be held blameworthy for it? Is he or she deserving of criminal liability and

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8. The highly influential German system, for example, uses the roughly analogous concepts of Tatbestand, Rechtswidrigkeit, and Schuld. *See, e.g.*, GEORGE FLETCHER, RETHINKING CRIMINAL LAW (1978); Wolfgang Naucke, *An Insider's Perspective on the Significance of the German Criminal Theory's General System for Analyzing Criminal Acts*, 1979 B.Y.U. L. REV. 1.

9. Some General Part issues also help address this question, such as the provisions defining offense culpability requirements, as in Model Penal Code section 2.02.

10. There is disagreement as to whether such issues of wrongdoing, and the justification defenses that resolve those issues, should be purely objective in their formulation or should include subjective criteria. *See* Paul H. Robinson, *Competing Theories of Justification: Deeds vs. Reasons*, *in* CURRENT PROBLEMS OF CRIMINAL THEORY 45 (A.T.H. Smith & A. Simester eds., 1996).

punishment? This question is answered primarily by excuse defenses (and perhaps culpability requirements). For example, wrongful conduct by an actor who is at the time insane or under duress or involuntarily intoxicated may not be sufficiently blameworthy to merit the condemnation of criminal conviction. The Model Penal Code doctrines that embody this inquiry are concentrated in Articles 2 and 4 of the Code.

A criminal code that purports to have moral standing must address each of these three questions; they are the questions that lay persons and philosophers alike use in assessing blameworthiness. The more explicitly the code's structure is based upon this three part structure the better, for such a structure signals to the persons governed by the code that the code does understand and attempt to make blameworthiness judgments that generally reflect those of the community. The importance of a code reflecting community views will be discussed further in Section Nine.

The tripartite structure also allows the system to make distinctions of practical importance. For example, the rules that make up the criminalization decision—the first inquiry—are not absolute prohibitions but rather are subject to the exceptions of the rules of the wrongdoing decision, such as justification defenses. The latter trump the former. For another example, in defining the kinds of conduct that we want an actor to be able to lawfully resist with defensive force, we need to distinguish conduct exculpated because it is not wrongdoing from conduct exculpated because it is not blameworthy. An actor may not resist a lawful arrest but he or she certainly may lawfully resist the psychotic aggressor. By having the doctrine mirror these important distinctions, it can rely upon them when needed.[11]

Title 18 contains no justification defenses and only one excuse defense (insanity), and lacks most other aspects of a

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11. For a fuller discussion of the practical importance of these distinctions, see Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199 (1982); PAUL H. ROBINSON, CRIMINAL LAW § 1.4 (1997).

General Part. The failure makes it impossible for that code to direct the use of this (or any other) analytic structure.

3. Define Offenses Fully, Using Defined Terms

For all the reasons described in section 1 above for why a code ought to provide a comprehensive General Part, a code also should fully define its offenses using defined terms. An undefined term invites judicial law-making in the same way as an absent or partial provision, and can as effectively undercut the goals of the legality principle. Every code will inevitably contain ambiguous language that must be interpreted by judges. A legislature's obligation is to reserve that delegation of judicial authority to the instances in which it is not reasonably avoidable. Code terms that might reasonably be given different definitions by different readers ought to be defined.

Again, the Model Penal Code does well in this matter. It not only defines each of a list of commonly used terms in section 1.13, but it also contains lists of defined terms at the beginning of each article in the Special Part. In addition, section 1.05 explicitly rejects common law offenses and bars judicial creation of offenses. Title 18 has no such provisions and a more ad hoc system for the definition of terms, while it often defines offenses with broad terms. As an example, 18 U.S.C. § 371 makes it a crime for "two or more persons to conspire . . . " but fails to define what constitutes a conspiracy. That approach to offense definition is no different, from a legality perspective, than the use of common law offenses. Compare, for example, Title 18's approach to the elaborate definition of conspiracy in Model Penal Code section 5.03.

4. Create a System for the Interpretation of Code Provisions

Where a code's provisions inevitably are ambiguous and judges must be relied upon for their interpretation, the same legality interests discussed above call for statutory

guidance in interpretation, to the extent that such can be given. Such statutory guidance in the exercise of discretion increases predictability, reduces disparity and the potential for the abuse of discretion, and furthers all the other virtues advanced by the legality principle. Beyond these legality interests, principles of interpretation also advance the goals for which criminal liability and punishment are imposed. An explicit statutory statement of those goals means that judges can take account of them as they interpret the code.

Model Penal Code section 1.02, for example, directs judges to interpret ambiguous provisions to further the code's purposes,[12] which it defines as follows:

> (a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;
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> (b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes;
>
> (c) to safeguard conduct that is without fault from condemnation as criminal;
>
> (d) to give fair warning of the nature of the conduct declared to constitute an offense;
>
> (e) to differentiate on reasonable grounds between serious and minor offenses.[13]

While the provision has its shortcomings, discussed in Section Eight below, it is an important first step toward rationality in code drafting, for it offers a formal statement of what the code is meant to achieve. Title 18 contains no such statement of purposes, nor any other statutory guidance for the judicial interpretation of the Title's provisions.

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12. MODEL PENAL CODE § 1.02(3) (Proposed Official Draft 1962).

13. The Code provides a statement of purposes for provisions relating to sentencing and corrections that has some additional purposes. *See id.* § 1.02(2).

5. Adopt a System of Offenses

Rather than a *collection* of offenses, where each offense is an independent creature, the result of a different political campaign, a code should adopt a *system* of offenses, in which offenses are designed to work together. Offenses should complement each other; they should avoid both gaps and overlaps in coverage. By considering all offenses together, the legislature can assure that the penalties associated with each offense properly reflect the relative seriousness of that offense in relation to other offenses.

The mark of a systematic approach to creating and defining offenses is a code that organizes offenses conceptually: offenses against the person, offenses against property, etc., and within each category additional categories. The Model Penal Code, for example, groups offense against the person into four articles: 210 (homicide), 211 (assault, endangerment, and threats), 212 (kidnapping and related offenses), and 213 (sexual offenses). That conceptual grouping makes it easier to see, and to avoid, overlaps among offenses and unwarranted grading disparities. It also makes it easier for a code user to find the relevant offense. And, when the relevant offense is found, such grouping assures the user that any other related offense is nearby, not hidden in a dark corner fifty provisions later.[14]

Federal criminal law unfortunately is a prime example of the accumulation approach to offenses. It has simply accumulated new offenses for two hundred years or so, with little examination or reformulation of existing offenses. The result is serious overlaps in coverage and irrationalities among offense penalties, which create new possibilities for disparity in treatment and for double-punishment for the same harm or evil. This disarray is reflected in Title 18's

14. The Model Penal Code drafters sometimes failed to carry through completely with this line of reform. It retained several offenses, such as robbery and burglary, that are specific combinations of other offenses. Such offenses create complications and possibilities for overlapping offenses that would not otherwise exist. *See* ROBINSON, *supra* note 11, §§ 15.2, 15.3.

organization. Rather than a conceptual organization of offenses, the Title arranges offenses alphabetically, from aircraft offenses to gambling offenses to railroad offenses to telemarketing fraud to wire communication offenses.

II. REFORMING THE MODEL PENAL CODE

The Model Penal Code was a historic advance over the criminal codes typical of its day. At the same time, the Code, like every code, has weaknesses, some minor, some not so minor. Each generation of code drafters can add something by standing on the shoulders of earlier drafters, but every draft leaves room for improvement. It is often the improved clarity of a great reform that allows us to see new problems.

Below are five suggestions for reform. The first are revisions that simply refine Model Penal Code formulations, moving in the direction that the drafters set. The subsequent proposals suggest reforms that increasingly move beyond the Code's approach.

6. Drafting Problems: Fix the Revealed Drafting Errors of the MPC

The Model Penal Code drafters were generally a brilliant and careful bunch, who rarely made drafting errors. The two examples of the Code's errors offered here illustrate that point, for neither is earth shaking. On the other hand, both are worth fixing. An example of a technical defect is the Code's failure to authoritatively define the objective element concepts that it usefully introduces in its definition of offenses: conduct, circumstance, and result elements. An example of a conceptual failure is its confused causation provision. Certainly other weaknesses in the Code also are worth fixing.[15]

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15. *Id.* § 4.2 (conflict between §§ 2.02(3) and (4)), §§ 5.1 & 5.2 (inconsistency in the treatment of inculpatory mistakes as to result and circumstance

a. Failure to Define the Distinction Among Conduct, Circumstance, and Result Elements

The Model Penal Code drafters invented a useful system for the precise definition of offenses. Section 1.13(9), defining "elements of an offense," distinguishes between (i) conduct, (ii) attendant circumstances, and (iii) a result of conduct. These are the objective building blocks for offense definitions. Each offense definition typically has at least one conduct element, which satisfies the requirement of an act. Most offense definitions include one or more circumstance elements as well, defining the precise nature of the prohibition—for example, having intercourse with a person *under 14 years old*—or the precise nature of a prohibited result—for example, causing the death of *another human being*.[16] A minority of offenses contain a result element. Homicide offenses, personal injury offenses, and property destruction offenses are examples of this minority; they require a resulting physical harm. Other offenses, such as endangerment, indecent exposure, and falsification, may require the actor to cause a risk of harm or an intangible harm, such as danger, alarm, or a false impression.[17]

Some of the potential benefits of the Model Penal Code's insight on categories of objective elements is lost by its failure to define those categories.[18] When does an ele-

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elements), §4.2 (inconsistency in the treatment of an actor's causing the conditions of his or her own defense), § 8.6 (complications from combining objective justifications and subjective mistake as to a justification in the same defense), §§ 11.2, 12.1, 12.3 (irrationality in requiring greater culpability for an inchoate offense than for the same element of the substantive offense).

16. Thus, the offense would not impose liability for causing the death of an unborn viable fetus (or an inviable fetus) if such was not within the definition of "human being." *See, e.g.*, Keeler v. Superior Court, 470 P.2d 617 (Cal. 1970).

17. MODEL PENAL CODE §§ 211.2, 213.5, 241.3(1)(b).

18. The Code does define "conduct," but uses seemingly contradictory forms of that term in different Code provisions. Section 1.13 takes a narrow view, suggesting that "conduct" simply refers to an actor's bodily movement. *Id.* § 1.13(2) & (5). In other places however, especially where the phrase "conduct constituting the offense" appears, "conduct" seems to be used in a broad

ment constitute a conduct element, as opposed to a circumstance element or a result element? The answer to this question requires determining crucial issues related to the offenses such as the appropriate level of culpability required. In the illustrations above, for example, one might argue that "under 14 years old" is not a circumstance element but rather is part of the conduct element, "having intercourse with a person under 14 years old." Similarly, "another human being" might be interpreted to be part of the result element of "causing the death of another human being," rather than as an independent circumstance element. Without definitions of the categories that distinguish among objective elements, such disagreements over categorization cannot be resolved.

Adding to the confusion, offense definitions commonly use terms that combine what might be different categories of elements. Verbs like "kills," "obstructs," "destroys," "falsifies," "mutilates," and "desecrates," combine conduct and results. Each would have its meaning unchanged if it were written as "engages in conduct by which he or she causes [death, obstruction, etc.]." Verbs like "compels" and "agrees"[19] combine conduct with its attendant circumstances. To "compel" a victim is implicitly to act "without his or her consent."[20]

The inability authoritatively to distinguish conduct, circumstance, and result elements is of practical significance because the categorizations are used in the application of several important General Part code provisions. For

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sense to mean bodily movement and all its relevant characteristics, such as the circumstances and results of the conduct. *Id.* §§ 1.02(1)(d), 1.03(2), 1.03(3), 1.05(1), 2.02(9), 2.04(3), 2.11(3)(a), 2.11(3)(b), 5.01(2)(g), 5.03(1)(a), 5.05(2).

19. Similar to the term "compels," the term "removes" can imply absence of consent, as in the definition of kidnaping. *Id.* § 212.1. The actor must "remove" his victim from the victim's residence or place of business; a willingness on the part of the victim to leave would not satisfy the requirement.

20. For further discussion of these kinds of difficulties in defining elements see ROBINSON, *supra* note 11, §§ 3.1, 4.2; Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 705-19 (1983).

example, the special requirements of the Model Penal Code causation provision, in section 2.03, apply only if an offense has a result element. It defines the required relation between the conduct and result elements of the offense definition. When an offense has only conduct and circumstance elements, causation need not be shown. Thus, if "obstructs" is interpreted to be a pure conduct element, for example, the state need only prove the conduct. It need not also satisfy the special requirements of causation, such as proof that the obstruction would not have occurred but for the actor's conduct or that the resulting obstruction was not too remote or accidental or too dependent upon another's volition act.[21] But if "obstructs" is viewed as embodying both a conduct element and a result element, then those special requirements must be proven.

Another example of dependence upon the distinction between "result" and "circumstance" elements is seen in the Code's treatment of inculpatory mistake. If the actor's mistake concerns a "result" element, then section 2.03(2)(a) and (3)(a) apply; if the mistake concerns a circumstance (or conduct) element, then presumably section 2.04(2) applies. While the two provisions address analogous conceptual problems, the Code gives different solutions to those problems.[22] An actor's liability may be different depending upon which section applies, which in turn depend upon the distinction between "result" and other elements, a distinction that the Code never defines.

Another practical importance of the difference arises from the fact that the Code defines culpability terms differently for each kind of objective element.[23] That is, the culpability requirements of the Code are asymmetrical. For example, "purposely" as to a *result* or *conduct* requires that

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21. *See* MODEL PENAL CODE § 2.03. This provision has its own difficulties, however, discussed in the next section. For a discussion of the special requirements for establishing an adequate causal connection between an actor's conduct and result, see ROBINSON, *supra* note 11, § 3.2.

22. *See* ROBINSON, *supra* note 11, §§ 5.1 & 5.2.

23. *Id.* § 4.1; Robinson & Grall, *supra* note 20, at 694-99.

the result or conduct be the actor's "conscious object." Being "knowing" is inadequate if an offense definition requires that the actor be "purposeful." Thus, being only "practically certain" that the conduct will cause the result or being "aware" of the nature of the conduct—the definitions of the lesser culpability of "knowingly" as to a result or conduct—are inadequate for liability where "purposely" is required.

But the Code defines "purposeful" as to a *circumstance* to require only that the actor be "aware" of the circumstance—the same requirement for the lesser culpability of being "knowing" as to a circumstance.[24] In other words, if an element is classed as a circumstance, a requirement that the actor be purposeful as to the element requires no more proof than a requirement that the actor be knowing as to the element.

Other asymmetry exists in relation to the definition of culpability as to a conduct element. While the Code defines "recklessly" and "negligently" as to a circumstance and a result, it does not define these terms as to conduct; "knowingly" appears to be the lowest culpability defined as to a conduct element.[25]

The following proposed definitions seem consistent with the spirit and intention of the Model Penal Code scheme: Define "conduct" elements narrowly to refer to the actual physical acts of the actor. Define all characteristics of the conduct to be separate "circumstance" elements; similarly, all results caused by the conduct should be defined as separate "result" elements. Define "result" elements to be a "circumstance" changed by the actor's conduct. As with conduct, define the characteristics of a result to be separate "circumstance" elements.[26]

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24. That an actor "hopes" or desires that a circumstance exists—the analogous requirement to a result or conduct being on actor's "conscious object"—is adequate to satisfy "purposely" as to a circumstance, but is not required. *See* ROBINSON, *supra* note 11, § 4.1. For another example of asymmetry see *id.* § 4.1.

25. *See id.* § 4.2.

26. Not everyone would agree that the proper response to the Code's fail-

Thus, an offense of "obstructing a public highway" essentially requires proof that the actor "engaged in conduct by which he or she caused the obstruction of a public highway." "Obstruction" is a result element; the state has to prove that the actor's conduct caused the obstruction, the change in circumstance. That it was a "public highway" was not something changed by the actor, but rather is a characteristic of the result of the conduct—that which was obstructed—and therefore is treated as a circumstance element. The "conduct" element here, as in many offenses, requires simply some act by the actor. No particular act is required, other than one that causes the required result (obstruction) with the required characteristic (a public highway). Under this definitional scheme, the conduct element commonly has little or no significance beyond satisfying the act requirement.[27]

b. Confusion in the Definition of Causation Requirements

An example of a conceptual error is found in the Code's provision concerning causation. The full text of the provision is set out in the footnote.[28] The natural complexities

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ure to define its categories is to provide such definitions. The English Law Reform Commission found the Model Penal Code's distinctions awkward and conceptually dubious. LAW COMMISSION, ATTEMPT AND IMPOSSIBILITY §§ 2.14-2.17 (Rep. No. 102, 1980).

27. For a more detailed description of this proposal and the reasons for it see ROBINSON, *supra* note 11, § 4.2. For a discussion of the act requirement see *id.* § 3.3.

28. Section 2.03. Causal Relationship Between Conduct and Result; Divergence Between Result Designed or Contemplated and Actual Result or Between Probable and Actual Result

(1) Conduct is the cause of a result when:

(a) it is an antecedent but for which the result in question would not have occurred; and

(b) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense.

(2) When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual

of causation issues are exacerbated by the drafters' creation of an unnecessarily complex (and misleading) provision. To start, Model Penal Code section 2.03 is unnecessarily confusing because it uses a triple negative, the need for which is not clear. The required culpability as to a result element "is *not* established if the actual result is *not* [that which was intended or risked] *unless* . . . "

A further oddity is found in the function of the provision. The first clause—"is not established if"—suggests that the subsection is defining a defense. But the "unless" clause reveals an opposite intention: While an actor might normally get a defense for the absence of the required culpability, this section is designed to take away that defense under the conditions specified in the "unless" clause in subsections (a) and (b). In other words, subsections 2.03(2) and (3)

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result is not within the purpose or the contemplation of the actor unless:

(a) the actual result differs from that designed or contemplated, as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused; or

(b) the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense.

(3) When recklessly or negligently causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which he should be aware unless:

(a) the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or

(b) the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense.

(4) When causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor's conduct.

MODEL PENAL CODE § 2.03.

are doctrines of imputation, not defense. Their purpose is to treat an actor as if he or she has a required culpable state of mind even though in fact the actor does not (as is done in the provision concerning voluntary intoxication, for example).

Subsection (2)(a) of the provision concerns cases of divergence between the result intended or risked and the result caused.[29] Such a provision appropriately is a doctrine of imputation. An actor may not have intended to harm the actual victim or may not have intended the actual harm. Yet, if he intended the same harm to a different target or intended a greater harm than that actually caused, it is nonetheless appropriate to treat him as though he intended to harm the actual victim, or intended to cause the actual harm. Subsection (a) can be faulted only because it does not state the authority for such imputation in the positive form that the legality principle prefers. It might have been phrased more effectively as follows: the required culpability is established if the actor intended a greater harm or intended the same harm to a different person.[30]

Subsection (2)(b), which concerns cases of remoteness, is more troubling.[31] The introductory language of section 2.03(2) is inappropriate to these provisions. That a result is "too remote or accidental" ought to provide a defense; it is not a ground for imputation as the introductory language suggests. More importantly, the limiting language at the beginning of subsection (b)—limiting the remoteness defense to instances where "the actual result involves the same kind of injury or harm [as that intended or risked]"—is inappropriate. The defense for a result that is "too remote or accidental" ought to be available in all cases,

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29. Subsection (3)(a) is parallel in form; it applies in an analogous fashion where the culpability required is recklessness or negligence.

30. The issue of divergence, and the drafting of this portion of the Model Penal Code provision, is discussed in greater detail in ROBINSON, *supra* note 11, § 5.1.

31. Subsection (3)(a) is parallel in form; it applies in an analogous fashion where the culpability required is recklessness or negligence.

not just those involving the same kind of injury or harm. If the falling piano only maims (rather than kills) the fleeing victim, the defendant ought not be causally accountable for the maiming any more than he ought to be accountable for causing the death if the victim is killed. What would be preferable is language requiring *in each case* that the conduct not only be a "but for" cause, but also that it be "not too remote or accidental."[32] For the same reasons, it also is doubtful that the remoteness defense should be limited by subsections (2) and (3)'s introductory language that limits the defense to cases where "the actual result is not within the [purpose or contemplation of the actor]/[risk of which the actor knew or should have known]."[33] Even if the actual result is the result intended, it ought to be a defense that the result is too remote or accidental.[34] A better approach is one like the following:

> Section 11A-2-2. Causal Relationship Between Conduct and Result.[35]
>
> Conduct is the cause of a result if:
>
> (1) the conduct is an antecedent but for which the result in question would not have occurred; and
>
> (2) the result is not too remote or too accidental in its manner of occurrence or too dependent upon another's volitional act to have a just bearing on the actor's liability or on the gravity of his offense; and
>
> (3) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense.
>
> (4) *Simultaneous Causes.* Where the conduct of two or more actors each simultaneously contributes to the result and each alone would have been sufficient to

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32. Proposed Rhode Island Criminal Code § 11A-2-2(2).

33. MODEL PENAL CODE § 2.03(2) & (3).

34. Thus, even if the actor sought to kill the victim by dropping a piano on him rather than shooting him, we are likely to judge the death too remote and accidental when the fleeing victim is killed by the accidental fall of a piano.

35. Proposed Rhode Island Criminal Code § 11A-2-2, constructed with language from a number of state code causation provisions.

> cause the result, the requirement of Subsection (1) of this section shall be held to be satisfied.

Having criticized the Model Penal Code provision, let me explain why it was drafted in its peculiar form. It was not out of sloppiness. The provision makes perfect sense if one assumes that offense definitions include a different requirement of culpability as to the result than that used in the discussion above. The drafters of the causation provision apparently assumed that the culpability required with respect to a result element is not simply culpability as to the result itself, but also includes a requirement that the actor be culpable as to the *way in which the result came about*. Nothing in the Code supports this interpretation. (Indeed, such an interpretation is entirely unworkable for reasons beyond the difficulties arising in relation to section 2.03.[36]) The culpability requirements defined in section 2.02 require culpability only as to the objective element to which they apply. If the result element is "causing death," the required culpability is culpability as to "causing death," not culpability as to "causing death [in a particular way]." Thus, the Code drafters apparently concluded that the Code would require for murder proof that the actor wanted to cause the death of another *and wanted to cause it in the way in which it actually came about*. From this mistaken view, the drafting of section 2.03 makes sense.

In *State v. Lassiter*,[37] for example, a prostitute jumped to her death to avoid further beating by her pimp. The drafters seem to think that proof of murder by the pimp would require proof that he intended to cause the woman's

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36. For example, how can one know in any case the level of detail in which the manner of causing the death must be intended. Is it enough that the actor intended to kill the victim by shooting him? or by shooting him in the chest? by shooting him in the chest so that his heart would be injured? Once the drafters require more than the element stated in the offense definition—causing death of another human being—there is no obvious way of drawing the line of how much detail as to causing the result is to be examined.

37. 684 P.2d 139 (Alaska Ct. App. 1984).

death *by causing her to jump out the window*; liability for murder could not be sustained, they apparently thought, upon proof that he intended to cause her death by beating her. They drafted section 2.03(2)(b), therefore, to impute to him what they thought was the needed culpability—the intention to cause her death by jumping out the window—based upon his having another equally blameworthy culpability—the intention to cause her death by beating.

But the code drafters are trying to solve a problem that exists only in their own minds. Nothing in the Code's provisions suggest that the culpability required as to a result, such as death of another human being, is any more than culpability as to the specific result described in the offense definition. If the offense required more—for example, if the offense specifically punished causing death by poison or death by explosive, as some offenses do (or death by causing someone to jump out a window)—then the defendant would have to have not only culpability as to causing the death, but also culpability as to causing death *by poison* or causing the death *by explosive* (or by causing the death *by having another jump out a window*). Absent a more demanding objective requirement like one of these, there is nothing in the Code to suggest that culpability as to a result requires anything more than culpability as to the result specified in the offense definition, the death of another human being.

The drafter's confusion may stem from the difference between culpability in the general sense of blameworthiness and culpability in the special sense of offense culpability requirements (such as those defined in Model Penal Code section 2.02). As the Code was being drafted, scholars came to the significant insight that proximate cause matters were essentially an issue of culpability in the general sense of blameworthiness.[38] Proximate cause is not subject to determination by applying an apparently empirical as-

38. *See* H.L.A. HART & ANTHONY M. HONORE, CAUSATION IN THE LAW 394-403 (2d. ed. 1985).

sessment of how "direct" or "immediate" the cause is to the result, as the common law would suggest.[39] Rather, it calls for a general normative assessment by the decisionmaker. As the Model Penal Code usefully expresses it, the result must not be "too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense."[40]

But, just because proximate cause and remoteness concern blameworthiness (culpability in the general sense), it does not follow that those issues concern offense culpability elements (culpability in the special sense). The Code distinguishes general blameworthiness issues from offense culpability in other contexts (note that excuse defenses are independent doctrines of exculpation; they do not negate offense culpability requirements). Thus, in suggesting that the necessary culpability required as to a result includes culpability as to the way in which the result came about, the drafters confuse the distinct concepts of general and special culpability. There is no reason to think that blameworthiness in the proximate cause context must be treated as an issue of offense culpability elements. Indeed, because the Code defines culpability requirements elsewhere *in relation to an offense's objective elements*,[41] it is unworkable to assume in the causation provision that a culpability element requires something more than proof of culpability *as to the corresponding objective element*.

The proposed provision above embodies the significant insight of the Model Penal Code drafters on the matter of

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39. In *Queen v. Pocock*, for example, all of the persons in the nearby village had the legal duty to repair, or have repaired, the potholes in the road so as to ensure safe travel. When a traveler died from an accident caused by the disrepair of the road, the court concluded that the villagers were not criminally accountable for the death. While the omission of each of them may have been a "but for" cause, the court concluded that the omission was not "immediately connected with the death," finding that the death was not the "direct consequence" of their omission. 117 Eng. Rep. 1194, 1196 (1851).

40. MODEL PENAL CODE § 2.03(3)(b).

41. *See id.* § 2.02(2).

causation, yet does so in a way that is simpler and clearer.

7. The Disparity Problem: Use More Offense Grading Categories

The discussion in Part I illustrates the Model Penal Code's advances in fulfilling the legality principle. The Code provides a clear, written statement of the rules governing liability and punishment that gives notice beforehand of the demands of the criminal law and reduces discretion in the adjudication of violations. In another area, however, the Code's failure to heed legality concerns threatens to undercut the good work it has done.

Legality interests traditionally have been given less expression in the context of sentencing, although this is changing with the advent of sentencing guidelines. But the issue of how much punishment to impose upon an offender is not exclusively a sentencing matter. Part of the criminal code's obligation is to establish the general range of punishment due an offender through the establishment of its grade, i.e., its relative seriousness compared to other offenses. The Code's legality advances in defining offenses and adjudicating liability are of limited effect if, once liability is imposed, judges have complete discretion over the amount of punishment. Of what value are safeguards in determining the offense for which an offender is liable if he or she can be sentenced as if guilty of a different offense?

The criminal code's important role in setting the grade of an offense determines the appropriate range of punishment. Grading provides a first approximation that is then refined in the sentencing process. But grading also does more. It is only through this function that the defendant has access to the full protections of the trial process in determining the facts upon which the amount of punishment is determined. And it is in setting the grade of the offense that the jury can express itself on the issue of offense seriousness. And it is in setting the grade that the jury and the code absolutely restrict a judge's exercise of discretion.

The Model Penal Code drafters do much to short-circuit the grading function of the Code by limiting the number of offense grades to five: first degree felony, second degree felony, third degree felony, misdemeanor, and petty misdemeanor.[42] In contrast, state codes commonly recognize twice as many grades.[43] Where state codes do not make this many grading categories, sentencing guidelines often do.[44] Even ten is dramatically fewer than the number of categories that can easily be made in distinguishing cases of different seriousness. The federal sentencing guidelines, for example, recognize 43 levels of offense severity.[45]

By putting the full range of offenses—from murder to cruelty to animals—into five categories, the Model Penal Code drafters blunt the effect of grading altogether, leaving judges with little restriction on what they can do. Even if the offense grade carried a minimum sentence—in the Model Penal Code, they do not—the range between the maximum and the minimum would have to be enormous to include the wide range of offenses covered by each of the categories of a five-category system. Even where the offense grade carries no minimum sentence, the grading of an offense provides an important public statement of the relative seriousness of the offense, a statement that judges will no doubt feel compelled to be attentive to if they are to avoid criticism for their sentencing decisions. But even this weak effect of grading is undercut by a five-category grad-

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42. *See id.*, art. 6.

43. *See, e.g.*, ARIZ. REV. STAT. § 13.601 (1989) (10 grades of offense); COLO. REV. STAT. §§ 18-1-105, 18-1-106, 18-1-107 (1986) (10 grades); DEL. CODE ANN. tit. 11, §§ 4201, 4202, 4203 (1995) (10 grades); 730 ILL. COMP. STAT. 5/5-5-1 (West 1993) (11 grades); NEB. REV. STAT. §§ 28-105, 28-106 (1995) (15 grades); N.Y. PENAL LAW § 55.05 (McKinney 1989 & Supp. 1997) (11 grades); OHIO REV. CODE ANN. § 2901.02 (Baldwin 1996) (12 grades); S.D. CODIFIED LAWS §§ 22-6-1, 22-6-2, 22-6-7 (1979) (10 grades); VA. CODE ANN. § 18.2-9 (Michie 1996) (10 grades).

44. *See, e.g.*, KAN. STAT. ANN. § 21-4704 (1995) (10 severity levels); MINN. STAT. ANN. § 244 (west 1995) (10 levels); 42 PA. CONS. STAT. ANN. § 9721, 204 PA. CODE § 303.16 (1996) (13 levels); WASH. REV. CODE ANN. § 9.94A.310 (West 1996) (15 levels).

45. U.S. SENTENCING GUIDELINES MANUAL § 5A (1995).

ing system. With only three grades of felonies and two grades of misdemeanors the grades must be so broad as to include offenses of very different seriousness. Further, as the trend toward reducing judicial sentencing discretion through guidelines continues, offense grading becomes more important because guidelines are frequently based upon offense grades.[46] The fewer the number of statutory grades, the less the power of the legislature's criminal code and the less the role of the jury in finding the facts upon which the mount of punishment is based.

In the federal system, the existing criminal law in Title 18 is so chaotic and unreliable with regard to grading that the Sentencing Commission was essentially forced to ignore the relative seriousness of offenses as expressed by their relative statutory penalties. Instead, the Commission created its own grading scheme, setting the relative seriousness of offenses according to their own assessment rather than that of the Congress. While that was the right thing to do under the circumstances, it was at the same time a tragic event. It revealed the sad failure of existing federal law to take its grading function seriously. Any revised federal code should recognize that responsibility, and thereby take back the important grading function for the legislature, where democracy properly places it.

To do so, however, the federal criminal code must expand dramatically the Model Penal Code's five offense grades, That five-grade system made sense at a time when it was seen as advantageous for judges to have broad sentencing discretion. Recall that it was just the year after the Model Penal Code was promulgated, that the Model Sentencing Act appeared. The report of that Model Act proudly claims:

> The [Act] diminishes [differences in] sentencing according to the particular offense. Under [the Act] the dangerous

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46. *See, e.g.*, ALA. CODE § 13A-5-6, 13A-5-7 (1994); ARIZ. REV. STAT. § 13-701 (1989); COLO. REV. STAT. § 18-1-105, 106, 107 (1986); ME. REV. STAT. ANN. tit. 17A § 1252 (West 1982); N.J. STAT. ANN. § 2C:43-6 (West 1995).

> offender may be committed to a lengthy term; the non-dangerous offender may not. It makes available, for the first time, a plan that allows the sentence to be determined by the defendant's make-up, his potential threat in the future, and other similar factors, with a minimum of variation according to the offense.[47]

Times have changed. No system claiming to be a system of "criminal *justice*" would today ignore the seriousness of an offender's crime in setting sentence. We also have come to see the injustice of sentencing disparity inherent in having a sentence based upon purely discretionary judgments.

Much of the current trend toward restricting judicial discretion has come from a recognition that broad sentencing discretion necessarily means sentencing disparity. Different judges have different sentencing philosophies, which necessarily implies different sentences for similar cases.

Consider a typical case in the criminal justice system in the United States: an offender is caught selling drugs to others in order to support his own drug addiction. A sentence that provides a strong deterrent to other potential drug sellers calls for a long prison term. A sentence that most effectively rehabilitates the offender may provide no prison term at all but rather places the offender in a drug treatment program, on the theory that curing the offender's drug addiction will take away his motivation to sell drugs to others. Such treatment combined with job training and employment counseling may help the offender to create a more productive life and to thereby better resist the temptation of drugs. Thoughtful Judge *A* might rationally decide it best to follow the rehabilitation approach. Thoughtful Judge *B*, in the court room across the hall, might rationally decide to follow the general deterrence approach.

Each of these judges is giving a rational sentence; each can give a specific explanation for why they have given that

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47. MODEL SENTENCING ACT (National Council on Crime and Delinquency 1963), *reprinted in* 9 CRIME & DELINQ. 337 (1963).

sentence and not another. Intelligent and thoughtful people can and often do disagree about some aspect of a complex issue, such as sentencing. But this predictable disagreement causes a troublesome result: two offenders who are identical in all relevant respects and who have committed identical offenses can receive very different sentences. One offender will receive a long prison term from Judge *B*, while the other will receive no prison term, just a treatment program, from Judge *A*. Improper disparity, then, can arise even among thoughtful judges trying to do a good job. It arises because different judges have different sentencing philosophies.

Such differences in sentencing philosophy have been confirmed by a number of studies. In one study, a survey of federal judges revealed that,

> [w]hile one-fourth of the judges thought rehabilitation was an extremely important goal of sentencing, 19 percent thought it was no more than 'slightly' important; conversely, about 25 percent thought 'just deserts' was a very important or extremely important purpose of sentencing, while 45 percent thought it was only slightly important or not important at all.[48]

Studies also confirm that these differences in philosophy do indeed translate into different sentences. One study done by the judiciary gave 50 judges the same 20 cases to sentence. The difference among the judges' sentences was staggering. In one extortion case, for example, the range of sentences varied from 20 years imprisonment and a $65,000 fine to three years imprisonment and no fine.[49]

This same disparity in sentencing is reflected in the sentences given in real cases every day. One study com-

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48. INSLAW, INC. ET AL., FEDERAL SENTENCING: TOWARDS A MORE EXPLICIT POLICY OF CRIMINAL SANCTIONS III-4 (1981), *quoted in* REPORT ON SENTENCING REFORM ACT OF 1983, S. REP. NO. 223, 98th Cong., 1st Sess. 37 n.18 (1983).

49. S. REP. NO. 223, *supra* note 48, at 41 n.23.

pared the sentences imposed in the different federal circuits. This as an example of what it found:

> The range in average sentences for forgery runs from 30 months in the Third Circuit to 82 months in the District of Columbia. For interstate transportation of stolen motor vehicles, the extremes in average sentences are 22 months in the First Circuit and 42 months in the Tenth Circuit.[50]

While the average federal sentence for bank robbery was eleven years, in the Northern District of Illinois (my district), the average is only five and one-half years.

Disparity in sentencing is a source of great unfairness, and that unfairness brings the criminal justice system into disrepute, for such disparity means that the sentence that an offender receives depends upon the judge to which the offender is assigned rather than the offense the offender committed. As the Senate Report on the reform legislation concludes:

> Sentencing disparities . . . are unfair both to offenders and to the public. A sentence that is unjustifiably high compared to sentences for similarly situated offenders is clearly unfair to the offender; a sentence that is unjustifiably low is just as plainly unfair to the public. Such sentences are unfair in more subtle ways as well. Sentences that are disproportionate to the seriousness of the offense create a disrespect for the law. Sentences that are too severe create unnecessary tensions among inmates and add disciplinary problems in the prisons.[51]

There can be little question that some mechanism is necessary to control unwarranted sentencing disparity. An offense grading system is the first step in that process. Unfortunately, current federal criminal law now abdicates its

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50. Whitney North Seymour, Jr., *1972 Sentencing Study for the Southern District of New York*, 45 N.Y.S. B.J. 163 (1973), *reprinted in* 119 CONG. REC. 6060 (1973), *quoted in* S. REP. NO. 223, *supra* note 48, at 38 n.21.

51. S. REP. NO. 223, *supra* note 48, at 42-43.

grading responsibility, essentially requiring the Sentencing Commission to take it over. A revised federal criminal code should take back that responsibility by adopting a system with an optimal number of grades—certainly many more than the five provided in the Model Penal Code—that thoughtfully assesses the relative seriousness of each offense in assigning each to the appropriate grading category.

8. The Rationality Problem: Define a Distributive Principle

No code can be entirely unambiguous. The natural ambiguity of language, if not political compromises, produce code provisions that can be interpreted several ways. In addition, many provisions necessarily call for the exercise of judgement; not every matter relevant to criminal punishment can be reduced to an objective rule. Inevitably, then, judges will exercise discretion in the interpretation of a code's provisions. The virtues of the legality principle discussed above—such as consistency and predictability in application, reduced potential for abuse of discretion, the fairness of prior notice—argue for giving judges guidance in the exercise of that discretion. It is for these reasons that the Model Penal Code drafters provide section 1.02, "Purposes; Principles of Construction," which instructs judges to interpret and apply the Code's provisions in the way that best furthers the purposes of the Code and lists those purposes.

Section 1.02 is a great advance in another respect as well. It formally confirms that the drafters see a criminal code as properly the subject of rational principled assessment. That is, a code is not just a collection of miscellaneous, accumulated rules, but rather an attempt to draft rules of liability and punishment based on rational principles. While this seems an uncontroversial premise, pre-Model Penal Code codes rarely contained anything that hinted at being a statement of purpose.

In other respects, however, the Code's provision is dangerous, because its claim to introduce rationality is as much facade as real. The provision mirrors the convention-

al wisdom of its day. Its list of purposes includes all four of the traditional purposes of criminal liability and punishment: to rehabilitate the offender to reduce the likelihood of a future offense, to deter the offender and other potential offenders from committing future offenses, to incapacitate the offender if necessary to prevent a future offense, and to impose the just punishment deserved for the offense. The first three purposes—rehabilitation, deterrence, and incapacitation—are openly utilitarian; they are concerned exclusively with avoiding future offenses. The last purpose—just deserts—is not utilitarian; it sees the imposition of deserved punishment as a valuable end in itself, without regard to whether it avoids future crimes.

The truth is, these alternative goals—the utilitarian goal of avoiding future crime and the desert goal of imposing just punishment—represent a basic disagreement about the purpose of criminal law. This is not simply a theoretical disagreement. These alternative goals have important and immediate practical implications for distributing criminal liability and punishment. Most importantly, these purposes commonly conflict with one another—that is, they suggest a different distribution of liability and punishment. The traditional utilitarian purposes conflict with desert. (Let me signal here that there are other, more fundamental utilitarian distributive principles that are left out of the traditional analysis, which I discuss in the next section.) And the traditional utilitarian purposes conflict with one another.

As to the first sort of conflict, consider, for example, a mentally ill offender or one suffering any number of physiological abnormalities that cause the commission of an offense. A desert distributive principle would acquit the dysfunctional person of all criminal liability on the ground that the person is not blameworthy for the offense; no punishment is deserved. But a utilitarian principle has many reasons to impose liability. The offender may be dangerous and require incapacitation. The punishment of such an offender reinforces the general prohibition against such offense conduct; that is, it serves a general deterrent pur-

pose. Such an offender may be in need of rehabilitation. In other words, all three utilitarian purposes are furthered by the imposition of liability and criminal sanctions, while desert requires that no liability be imposed because of the person's blamelessness for the offense.

In a second set of cases, of the *reverse* sort, the utilitarian principles would not punish an offender even though the desert principle would. This occurs, for example, in recognition of the defense for inherently unlikely attempts, such as that found in the Model Penal Code.[52] This defense is available to a defendant whose attempt to commit an offense is inherently unlikely, such as a person with a contagious disease who tries to give the deadly disease to another by spitting on them although such transmission is impossible. Or consider the even clearer case of the practitioner of "voodoo" who believes he can kill another person by placing a spell on him or by sticking needles in a doll representing the person. Because the person's conduct is harmless and the person is not dangerous, the utilitarian principles conclude that the imposition of criminal sanctions on such a person would be a waste of resources. It is this utilitarian reasoning that leads the Model Penal Code to create a defense for an inherently unlikely attempt. The desert principle, in contrast, takes the person's attempt to kill as evidence of blameworthiness deserving punishment.

For another example, consider the Nazi war criminal who is discovered and prosecuted decades after the war. He may be a useful and productive member of society, with no need of rehabilitation or incapacitation. The circumstances of the Third Reich will never arise again. Yet, the offender is blameworthy, and the desert principle insists he be punished for his past offense even though it will have little consequence for the future.

The inherent conflict between desert and the traditional utilitarian theories also is illustrated by the difference in the kinds of factors that the utilitarian and desert purpose

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52. *See* MODEL PENAL CODE § 5.05(2).

take into account in setting a sentence. If incapacitation of the dangerous were the sole determinant for the distribution of criminal sanctions, prison terms would be set according to those factors that best predicted future crime: The higher the likelihood of a serious crime in the future, the stronger the case for imprisonment and, often, the longer the sentence. One of the best predictors of future criminality is past employment history.[53] Thus, unemployment for the preceding two years might aggravate the grade of an offense or increase the sentence imposed. An offender's age and family situation are also good predictors of future criminality,[54] and thus would also determine the offender's liability and sentence: younger offenders and offenders without fathers in the home would receive longer prison terms. Indeed, if incapacitation of the dangerous were the only distributive principle, there is little reason to wait until an offense is committed to impose criminal liability and sanctions; it is more effective in preventing crimes to screen the general population for dangerous persons and "convict" those found to be dangerous and in need of incapacitation.[55]

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53. *See, e.g.*, DON M. GOTTFREDSON ET AL., GUIDELINES FOR PAROLE AND SENTENCING 41-68 (1978); PETER W. GREENWOOD, SELECTIVE INCAPACITATION 11-26 (1982).

54. Age has been found to be an effective predictor of future violence. *See, e.g.*, Joseph J. Cocozza & Henry Steadman, *Some Refinements in the Measurement and Prediction of Dangerous Behavior*, 131 AM. J. PSYCHIATRY 1012 (1974) (*cited in* State v. Davis, 477 A.2d 308, 311-312 (1984)). For a discussion of the predictive value of various aspects of an offender's family situation see A. BLUMSTEIN ET AL., DELINQUENCY CAREERS: INNOCENTS, DESISITERS, AND PERSISITERS 198 (1985); *see also* GREENWOOD, *supra* note 53, at 50 (Greenwood identifies several other factors of predictive value: prior convictions of the instant offense type; incarceration for more than half of the preceding two years; conviction before age 16; time served in a state juvenile facility; drug use during preceding two years; and employment for less than 50% of the preceding two years).

55. One study suggests that rapists may be distinguished from non-rapists based upon their penal erection response to certain stimuli. ABEL ET AL., *The Components of Rapist Sexual Arousal*, 34 ARCHIVES GEN. PSYCHIATRY 895 (1977). If the predictive technique were sufficiently refined, a pure incapacitation distributive principle might find it appropriate as a basis for distributing criminal liability. *See generally* Sanford H. Kadish, *The Decline of Innocence*,

If deterrence were the sole distributive principle for liability and punishment, potential offenders' perception of the probability of apprehension would be highly relevant in determining the sanction needed to effectively deter.[56] Offenses with a perceived low probability of apprehension would be graded higher and punished more severely in order to compensate for that perceived low probability of apprehension. Potential offenders' perception of the likelihood of conviction also can be a powerful force. Thus, it may be useful to drop those requirements of liability that prosecutors find difficult to prove, such as culpability requirements (intention, recklessness, and the like), because such reforms would increase the perceived likelihood of conviction. A pure deterrence principle also would logically base liability upon the extent of the publicity that the sanction will receive. Just as an advertising executive willingly pays more for an advertisement that will reach more people, the cost of a higher criminal sanction is a good investment if its deterrent message will reach more people. Thus, greater news coverage of a case would aggravate the grade of the offense and lengthen the prison term imposed.

If rehabilitation were to govern distribution of punishment, the person's amenability to reform or treatment would be central. It was in furtherance of the rehabilitative purpose that fully indeterminate sentences were imposed in the recent past. The length of the sentence was determined by the length of time necessary for rehabilitation of the offender, which could not be determined beforehand. The offender's term of imprisonment continued indefinitely until the offender was rehabilitated. Thus, a minor offense might call for a long term of incarceration and a serious offense might call for no incarceration, if long-term treatment were required to avoid recidivism in the first case and no treatment were required in the second. Indeed, with a pure

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26 CAMB. L.J. 273 (1968).

56. *See, e.g.*, Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1235-36 (1985).

rehabilitation principle, as with a pure incapacitation principle, there is little reason to wait for an offense to occur. The population would be screened for those people who might commit an offense in the future if not given rehabilitative treatment, then liability and sanctions would be imposed to compel the required treatment and thereby avoid the anticipated crime.

In all three of these instances—a purely utilitarian distributive principle of incapacitation, deterrence, or rehabilitation—it seems clear that the factors that would determine whether liability is imposed and, if so, the extent of the sanctions, are very different from the factors relevant to a desert distributive principle. A person does not *deserve* more punishment for an offense because he has a poor employment history, or is young, or has no father in his household, factors that would increase the length of incarceration under a distributive principle of incapacitation of the dangerous. A person does not deserve more punishment because his offense is one with a perceived low apprehension or conviction rate or because the news coverage of the case is high, factors that would increase the length of incarceration under a deterrence distributive principle. A person does not deserve more punishment because the kind of rehabilitation program that might help him would take longer than other programs, a factor that would increase the length of incarceration under a rehabilitative principle. And, certainly, no person deserves punishment before committing an offense, although incapacitation and rehabilitation principles would impose liability before commission if the person was predicted to commit an offense.

The traditional utilitarian purposes not only look to different criteria than desert in imposing liability and sanctions, but also fail to look at factors that a desert principle finds central. Even the nature of the crime committed may be of little relevance under some utilitarian purposes, as evidenced by the approach of the Model Sentencing Act

quoted in the previous section.[57]

There are many who, faced with the problem of the conflict of desert and the traditional utilitarian theories, quickly resolve the conflict by electing a purely utilitarian view and ignoring desert concerns. This is not an irrational view, given the dimension of the crime problem in the United States. Serious crime has increased four-fold in the past four decades. With this history, it is not unreasonable to decide that the criminal justice system's sole goal should be to reduce crime, that doing justice is a luxury that we as a society cannot afford.

Unfortunately, even this simplification of the problem—ignoring desert in favor of utility—does not solve it. The fact is, different utilitarian approaches conflict with each other as much as the traditional conflict between utility and desert. For example, deterrence frequently conflicts with incapacitation, as when some abnormal condition external to the offender, such as duress, coercion, or non-justified necessity, highly influences the person's criminal conduct. Because the conditions are responsible for the offense conduct, the person may not be dangerous. On the other hand, the same coercive conditions create the need for a greater rather than a lesser deterrent threat. Greater threatened sanctions provide a needed additional deterrent in the face of the added pressure to commit the offense.[58]

In a famous British case, *Regina v. Dudley & Stephens*,[59] for example, sailors adrift in a lifeboat killed the cabin boy, who was sick, so that they could drink his blood and keep themselves alive until rescue. The sailors who did this were hardly dangerous people in a general sense; there was little indication that they would commit

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57. *See supra* text accompanying note 47.

58. If the pressure to commit the offense is so great as to be essentially irresistible, the "special deterrence" rationale may disappear (deterrence of the offender at hand in a similar situation in the future); in such a situation, any sanction would be futile and thus an inefficient expenditure. There may remain, however, a "general deterrent" purpose in imposing a significant sanction.

59. 14 Q.B.D. 273 (1884).

any offense in the future if not imprisoned (assuming they stayed off boats adrift at sea). But to let them escape liability undercuts the general deterrent threat to others. In fact, deterrent theory can argue, it is especially in situations like theirs, where there is great incentive to kill, that there is a need for a greater deterrent threat to offset the greater temptation. A deterrence principle increases liability in the case of external pressures to commit an offense, while an incapacitation-of-the-dangerous principle decreases liability.[60]

The same conflict arises in mitigations like heat of passion and provocation. In these cases, an otherwise normal person reacts less than admirably when confronted with a difficult situation. Such a person is not as dangerous as a person who kills absent the mitigating conditions, but, as with instances of duress, coercion, and non-justified necessity, there is a greater need for a deterrent sanction to oppose the temptation.

Another example where incapacitation (and rehabilitation) conflict with deterrence is in setting the grade and sentence for an attempted offense, as compared to a completed offense, and in the related issue of defining the required causal relationship between an offender's conduct and a prohibited result. Deterrence suggests reduced liability for an unsuccessful attempt, or the absence of a causal connection with a harm, because the absence of the harm means the sanction will get less attention than in a case where the harm actually occurred. Murder cases get more attention than attempted murder cases. The absence of attributable harm does not, however, alter the offender's dangerousness or need for rehabilitation: the attempted

60. This analysis reflects a simple deterrence goal, that is, the goal of deterring as much crime as possible. A goal of cost-efficient deterrence would justify greater sanctions in response to greater pressures to commit the offense, only to the extent that the cost of the sanctions are less than the cost of suffering the offense. Under this efficient deterrence theory, some crime ought not be deterred—crime that costs more to deter than it costs to suffer. *See, e.g.*, Shavell, *supra* note 56, at 1244-45.

murderer has already shown his intention and willingness to kill.

The point is that desert and the traditional utilitarian theories conflict with each other and the latter conflict among themselves; they inevitably distribute liability and punishment differently. The Model Penal Code drafters were not ignorant of this conflict. The Code's commentary explains that when purposes conflict they should be "justly harmonized."[61] Other writers have suggested that these competing interests are to be "balanced,"[62] or "blended,"[63] or "accommodated."[64]

But this notion of compromising or blending competing purposes is problematic. When utility and desert conflict, as in the kinds of situations illustrated above, a judge must choose between the purposes. To choose one is to sacrifice the other. Trading partial utility for partial injustice nonetheless causes injustice. There is no compromising desert

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61. The commentary explains:

> The section is drafted in the view that sentencing and treatment policy should serve the end of crime prevention. It does not undertake, however, to state a fixed priority among the means to such prevention, i.e., the deterrence of potential criminals and the incapacitation and correction of the individual offender. These are all proper goals to be pursued in social action with respect to the offender, one or another of which may call for the larger emphasis in a particular context or situation. What the Code seeks is the just harmonizing of these subordinate objectives, rather than the concentration on some single target of this kind. It is also recognized that not even crime prevention can be said to be the only end involved. The correction and rehabilitation of offenders is a social value in itself, as well as a preventive instrument. Basic considerations of justice demand, moreover, that penal law safeguard offenders against excessive, disproportionate or arbitrary punishment, that it afford fair warning of the nature of the sentences that may be imposed upon conviction and that differences among offenders be reflected in the just individualization of their treatment.

MODEL PENAL CODE § 1.02 commentary at 4 (Tentative Draft No. 2, 1954).

62. Stanley A. Cohen, *An Introduction to the Theory, Justifications and Modern Manifestations of Criminal Punishment*, 27 MCGILL L.J. 73, 81 (1981).

63. SOLICITOR GENERAL, REPORT OF THE CANADIAN COMMITTEE ON CORRECTIONS—TOWARD UNITY: CRIMINAL JUSTICE AND CORRECTIONS 188 (1969) (known as the Ouimet Report).

64. Cohen, *supra* note 62, at 73.

and the traditional theories of utility; to impose punishment more or less than an offender deserves is to fail to give the offender his or her just deserts. Even where tradeoffs are theoretically possible—among utilitarian purposes—a compromise between conflicting utilitarian mechanisms often serve neither effectively. Recall the common drug hypothetical noted in the previous section. If we averaged the long prison term of hypothetical Judge *A* and the no prison term of hypothetical Judge *B,* the resulting sentence is too short to send the general deterrent message that Judge *A* wants but also fails to provide the rehabilitation that Judge *B* wants.

Another approach to resolving this conflict, and a very common one among judges, is to select the purpose most appropriate for the situation. This common practice of shifting purposes is evident in criminal codes themselves. For example, most state criminal codes maintain an insanity defense[65] because it exculpates the blameless (and thus furthers just punishment), even though abolishing the defense might more effectively incapacitate the dangerous. Yet, the same codes sacrifice just punishment, in favor of increasing deterrence, when they recognize strict liability.[66] At the same time, rather than increasing the threatened sanction when the temptation or inclination is greater, as a deterrence principle suggests, the same codes frequently decrease the deterrent threat, in cases of provocation,[67] for example—because of the offender's reduced blameworthiness. Code drafters choose to further different purposes in different contexts.[68]

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65. *See* 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 173 n.1 (1984).

66. *See, e.g.,* MODEL PENAL CODE § 213.6(1) (strict liability as to age in some sexual offenses).

67. *See* 2 ROBINSON, *supra* note 65, § 102 nn.2 & 9.

68. The theoretically sophisticated Model Penal Code is no different. It reflects not only the above ambivalence, if that is what it is, but, like every other code, provides additional examples. It keeps an insanity defense, MODEL PENAL CODE § 4.01, to further desert principles at the expenses of incapacitation, but then it rejects desert in favor of incapacitation when it provides a defense to unsuccessful attempters who are not dangerous, *id.* § 5.05(2), and

The same changing choices among conflicting purposes occurs in sentencing. Rehabilitation might be the best means of avoiding future crime by a young addict who is caught selling drugs to support his habit. But a judge might rationally decide to impose a long prison term in order to further general deterrent interests. Yet, when faced with a young bank teller who embezzled money from her cash drawer, the same judge might decide to forego the general deterrent value of a long prison term and put the offender on probation, under an incapacitative theory—she is no longer dangerous because she will never again be placed in a position of trust. Each of these sentences is justified by one of the purposes of sentencing, but may nonetheless be the product of arbitrary or biased decision-making. Without a principle governing when one sentencing purpose is to be followed at the expense of another, judges are free to choose the purpose to fit the sentence.

A cynic may conclude that the use of "the purposes" to justify a particular code formulation or sentence is a convenient means of rationalizing results for which the decision-maker has another, undisclosed reason. That is, unless a decision-maker follows an articulable principle as to when one purpose will be selected over another, it is possible that the choice of purpose is simply an exercise in justifying the result that the judge prefers for other, unspoken reasons. Why do we not insist that code drafters adopt, and that judges follow, a statement of the interrelation among purposes that directs the choice among conflicting purposes? The cynic can argue that reliance upon "the purposes," without an explanation as to how the governing purpose is selected, is popular as a method of justification precisely

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when it sets the penalty for an attempt at the same level as that for the completed offense, *id.* § 5.05(1). While it rejects the significance of resulting harm in attempts—because resulting harm does not manifest an offender's dangerousness—it stresses the importance of resulting harm by insisting on a strong causal connection between the offender's conduct and criminal results required by an offense definition, *id.* § 2.03, presumably because blameworthiness requires such a causal connection.

because it is a system that offers hidden flexibility. It presents a picture of rationality—and may even seem that way to those who use it—yet, without an explanation of why or how a decision-maker shifts among the purposes, the decisions may in fact be a matter of pure personal preference.

Whether the flexibility of rationalization offered by use of "the purposes" scheme has been used for conscious manipulation or instead is the result of inadvertent vagueness, it seems clear that a rational and principled system for the distribution of criminal sanctions must define the interrelation of the multiple purposes it seeks to further; that is, it must fully articulate its distributive principle.

I have written elsewhere about how to define the interrelation of alternative distributive principles, through the use of "hybrid" distributive principles.[69] That analysis suggests that, unless one is willing to adopt one purpose to the exclusion of all others, constructing a "hybrid" distributive principle in practice is a difficult and complex enterprise. Not only must one determine when and where each purpose is most effective, one must determine the relative effectiveness of each purpose in each situation. In the next section I argue that we need not undertake that difficult task. If you find my arguments in that section unpersuasive, then you have little alternative but to try for yourself.

9. The Utility of Desert: Avoid Conflicts with the Community's Perceptions of Desert

This section argues that we need not try to reconcile the irresolvable conflict between desert and the traditional utilitarian purposes, nor need we resolve the conflicts among the traditional utilitarian purposes—rehabilitation, deterrence, and incapacitation. Why not? Because another utilitarian purpose is more important than the rest and, perhaps surprisingly, it yields a distribution of liability that

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69. *See* Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19 (1987).

mirrors that of desert in many if not most respects.

In a recent article, John Darley and I have argued that the greatest utility is in desert.[70] Here is a brief summary of the argument: the real power to enforce compliance with society's rules of prescribed conduct lies not in the threat or reality of official criminal sanction, but in the power of the intertwined forces of social and individual moral control. The networks of interpersonal relationships in which people find themselves, the social norms and prohibitions shared among those relationships and transmitted through those social networks, and the internalized representations of those norms and moral precepts cause people to obey the law.[71]

The law is not irrelevant to these social and personal forces. Criminal law, in particular, plays a central role in creating and maintaining the social consensus necessary for sustaining moral norms. In fact, in a society as diverse as ours, the criminal law may be the only society-wide mechanism that transcends cultural and ethnic differences. Thus, the criminal law's most important real world effect is arguably its ability to assist in the building, shaping, and maintaining of these norms and moral principles. It contributes to and harnesses the compliance-producing power of interpersonal relationships and personal morality.[72]

The criminal law can have a second effect in gaining compliance with its commands. If it earns a reputation as a reliable statement of what the community, given sufficient information and time to reflect, perceives as condemnable, people are more likely to defer to its commands as morally authoritative and as appropriate to follow in those borderline cases where the propriety of certain conduct is unsettled or ambiguous in the mind of the actor. The importance of this role should not be underestimated. In a society with the complex interdependencies characteristic of ours, an

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70. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).

71. *See id.* at 468-77.

72. *See id.* at 471-74.

apparently harmless action can have destructive consequences. When the action is criminalized by the legal system, one wants the citizen to "respect the law" in such an instance even though he or she does not immediately intuit why that action is banned. Such deference is facilitated if citizens are disposed to believe that the law is an accurate guide to appropriate prudential and moral behavior.[73]

The extent of the criminal law's effectiveness in both these respects—in facilitating and communicating societal consensus on what is and is not condemnable, and in gaining compliance in borderline cases through deference to its moral authority—is to a great extent dependent on the degree of moral credibility that the criminal law has achieved in the minds of the citizens it governs. Thus, the criminal law's moral credibility is essential to effective crime control, and is enhanced if the distribution of criminal liability is perceived as "doing justice," that is, if it assigns liability and punishment in ways that the community perceives as consistent with the community's principles of appropriate liability and punishment. Conversely, the system's moral credibility, and therefore its crime control effectiveness, is undermined by a distribution of liability that deviates from community perceptions of just desert.

The central point is this: the criminal law's power in nurturing and communicating societal norms and its power to have people defer to it in unanalyzed cases is directly proportional to criminal law's moral credibility. If criminalization or conviction (or decriminalization or refusal to convict) is to have an effect in the norm-nurturing process, it will be because the criminal law has a reputation for criminalizing and punishing only that which deserves moral condemnation, and for decriminalizing and not punishing that which does not. If, instead, the criminal law's reputation is one simply of a collection of rules, which do not necessarily reflect the community's perceptions of moral blameworthiness, then there is little reason to expect

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73. *See id.* at 474-76.

the criminal law to be relevant to the societal debate over what is and is not condemnable and little reason to defer to it as a moral authority. What then are the requirements for a criminal law system to gain this credibility? How can this credibility be lost?

Enhancing the criminal law's moral credibility requires, more than anything, that the criminal law make clear to the public that its overriding concern is doing justice.[74] Therefore, the most important reforms for establishing the criminal law's moral credibility may be those that concern the rules by which criminal liability and punishment are distributed. The criminal law must earn a reputation for (1) punishing those who deserve it, under rules perceived as just, (2) protecting from punishment those who do not deserve it, and (3) where punishment is deserved, imposing the amount of punishment deserved, no more, no less. Thus, for example, the criminal law ought to maintain a viable insanity defense that excuses those who are perceived as not responsible for their offense, it ought to avoid the use of strict liability (imposing liability in the absence of a culpable state of mind), and it ought to limit the use of non-exculpatory defenses.[75] In other words, it must adopt rules that distribute liability and punishment according to desert, even if a non-desert distribution appears in the short-run to offer the possibility of reducing crime.

The law's moral credibility also may depend upon procedural and institutional reforms, as I have suggested elsewhere.[76] Some of these include less use of the exclusionary rule to exclude reliable evidence, less plea

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74. *See id.* at 477-88.

75. It is not feasible to eliminate some non-exculpatory defenses, such as diplomatic immunity, but others can be narrowed if not eliminated. The length of statutes of limitation can be increased to avoid barriers that frustrate prosecutions that the society remains interested in. *See* 2 ROBINSON, *supra* note 65, at 465-66. The entrapment defense can be eliminated. *See* Christopher D. Moore, *The Elusive Foundation of the Entrapment Defense*, 89 NW. U. L. REV. 1151 (1995).

76. Paul H. Robinson, *Moral Credibility and Crime*, ATLANTIC MONTHLY, Mar. 1995, at 72.

bargaining for reasons unrelated to genuine factual disputes, less restriction on police power where affected citizens want more, and insistence that non-incarcerative sanctions have sufficient punitive bite to inflict the amount of punishment deserved. Such reforms also include increased protection of inmates against prison violence, decreased use of dangerousness as a criterion in setting prison terms, and more vigorous police training, discipline, and leadership to bring greater respect and restraint by police in dealing with citizens.

The point is that every deviation from a desert distribution incrementally undercuts the criminal law's moral credibility, which in turn undercuts its ability to help in the creation and internalization of norms and its power to gain compliance by its moral authority. Thus, contrary to the apparent assumptions of past utilitarian debates,[77] such deviations from desert are not cost free, and their cost must be included in the calculation when determining which distribution of liability will most effectively reduce crime.

Most important to the criminal law's moral credibility is the reputation of its rules for the distribution of liability and punishment. That means that an effective criminal code must mirror community perceptions of desert[78] where

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77. Consider Shavell's assertion:

> Whether or not a party will actually commit an act . . . depends on his perception of the possibility that he will suffer a sanction, either monetary or nonmonetary. A party will commit an act if, and only if, the expected sanction would be less than the expected private benefits. If he decides not to commit an act, he will be said to be deterred.

Shavell, *supra* note 56, at 1235. Certainly if one believes, as Shavell does, that only the threatened sanction affects a person's decision on whether to commit an offense, then the extent to which the distribution of sanctions deviates from that perceived as deserved is irrelevant to the calculations.

78. By "community perceptions of desert" we do not mean community views on a particular case, for those views are often distorted by the publicity the case receives and can be biased by the community's view of the particular people involved in the case. What we mean, instead, is "community perceptions of desert" as represented by principles for assigning blame and punishment derived from empirical studies of how the community evaluates blame-

possible. If the code drafters feel compelled to deviate, they should do so with an appreciation that such deviation ultimately has a cost in terms of reduced crime control effectiveness.[79]

10. A Functional Form: Segregate the Rules of Conduct and the Principles of Adjudication into Distinct Codes

A traditional criminal code performs several functions. It announces the law's commands to those whose conduct it seeks to influence. It also defines the rules to be used in deciding whether a breach of the law's commands results in criminal liability and, if so, the grade or degree of liability. In serving the first function, the code addresses all members of the public. In performing the second function, it addresses lawyers, judges, jurors, and others who play a role in the adjudication process.

In part because of the different audiences, the two functions call for different kinds of documents. To effectively communicate to the public, the code must be easy to read and understand. It must give a clear statement, in objective terms if possible, of the conduct that the law prohibits and under what conditions it is prohibited. Readability, accessibility, simplicity, and clarity are the characteristics of a code that most effectively articulate and announce the criminal law's rules of conduct.

Adjudicators, on the other hand, can tolerate greater complexity. Clarity and simplicity are always a virtue but the judgments required of adjudicators necessarily limit how simple the adjudication rules can be. While the public can be told rather easily and clearly that "you may not

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worthiness and assigns punishment in the abstract. *See* Robinson & Darley, *supra* note 70, at 236-41. This is a challenging task for social scientists, but one that Darley and I demonstrate to be feasible in our recent book, PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995).

79. *See* Robinson & Darley, *supra* note 70, at 477-88; ROBINSON & DARLEY, *supra* note 78, ch. 7.

cause bodily injury or death to another person,"[80] when a prohibited injury or death does occur, the adjudicators need rules to determine whether the injurer ought to escape liability because he or she had no culpability, was insane, mistakenly but reasonably believed that the force used was necessary for self-defense, or for any number of other reasons. If liability is appropriate, the adjudication rules must determine the degree of liability that is appropriate, taking account of the level of the actor's culpability, the extent of the injury, and a variety of other mitigating and aggravating circumstances. Many, if not most, of these liability and grading factors must use complex and sometimes subjective criteria.

The use in current practice of a single code to perform both functions means that neither function is performed as well as it could be.[81] In a recent article, I and two co-authors demonstrate that it is possible to avoid these difficulties by drafting two codes—a "code of conduct" to articulate the rules of conduct, written for lay persons, and a "code of adjudication" to govern the adjudication process, written for criminal justice professionals.[82]

The possibility of creating separate codes for separate functions is made feasible in part because each doctrine of criminal law typically serves one or the other function. For example, to effectively communicate to the members of the public the rules needed to conform their conduct to the requirements of law, it is not necessary to clearly communicate the subtleties of the insanity defense, the detailed definitions of culpable states of mind, or the operation of the entrapment doctrine. That is, a code of conduct and a code of adjudication can be created by segregating the doc-

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80. *See* Paul H. Robinson et al., *Making Criminal Codes Functional: A Code of Conduct and a Code of Adjudication*, 86 J. CRIM. L. & CRIMINOLOGY 304, 336 (1996).

81. *See generally* Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857 (1994); Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729 (1990).

82. *See* Robinson et al., *supra* note 80.

trines of criminal law into one or the other code according to the function that each doctrine performs. (There is no suggestion by this segregation that the code drafted for adjudicators be kept secret from the public.[83]) The resulting codes, we argue, more effectively perform each of the functions of a criminal code than does the combined code approach typical in today's codes.

SUMMARY AND CONCLUSION

This article suggests ten changes that ought to be included in a reform of federal criminal law. Five of those are what would be considered basic characteristics of any modern criminal code, and are in large part the earmarks of the Model Penal Code and its progeny: a comprehensive general part, an analytic structure, fully defined offenses using defined terms, a system for the interpretation of code provisions, and a system of offenses that avoids overlaps and gaps.

While the Model Penal Code made great advances, the 35 years since its promulgation have revealed shortcomings, and suggest a number of other reforms that a new federal criminal code might profitably adopt. Least controversial is fixing the revealed drafting errors of the Model Penal Code. The article gives two examples of such errors, one technical, one conceptual: failure to define the distinction among conduct, circumstance, and result elements, and confusion in the definition of causation requirements.

Other proposed reforms move beyond the perspective of the Model Penal Code drafters, and take account of the last decade's movement toward greater guidance of judges' sentencing discretion. Consistent with that trend, a new code should use more grading categories, in order to have the liability determination under the criminal code more narrowly constraint the range of possible sentences at the sentencing stage. Also consistent with the recent trend, in

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83. *Id. at* 332-33.

its ideal if not its practice, is the proposal that code drafters follow an articulated distributive principle to develop statutory formulations and to define the rules by which the code provisions are to be interpreted.

Still more distant from the approach of the Model Penal Code are the final two proposals. First, it is suggested that a new code be drafted in a way that avoids conflicts with the community's perceptions of desert, for this is necessary to enhance the code's moral credibility with the community it governs, which in turn is necessary to increase the code's power to gain compliance by that community. Finally, in a proposal that would make criminal codes look very different than they currently do, the article suggests that a new criminal code be drafted as two codes: one addressed to the general public defining for them ex ante the rules of lawful conduct, the other written for criminal justice adjudicators—judges, lawyers, police officials, and juries—that sets principles for ex post adjudication of a violation of the rules of conduct. It is only through this separation, it is argued, that codes can effectively perform both of the two central functions of a criminal code: communicating to the public ex ante the rules of lawful conduct, and defining for adjudicators the principles governing ex post adjudication of a violation. These last two suggestions require the greatest explanation and justification, but given the limitations of this forum, that justification can only be briefly summarized, with fuller explication left to full article treatment elsewhere.

The political contentiousness of the present congress suggests that it may be difficult to gain the cooperation and consensus that history suggests is needed for reform of the federal criminal code. A reform effort nonetheless is worth pursuing, both because of the pitiful condition of the current federal code and because of reform's potential to greatly benefit criminal justice in the federal system, as well as in the states and other countries.